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The Harms of Privacy

Eric Descheemaeker*

Abstract. This paper aims to identify and order the harms or losses which the law might compensate in actions for breach of privacy. *Part I* identifies three such harms: pecuniary loss, mental distress and breach of privacy per se. *Part II* comprises an ordering exercise which requires a theoretical detour in order to explain why the redress of these various heads of detriment answers to two different logics which ought not to be combined. This is because pecuniary loss and mental distress correspond to a ‘bipolar’ model of tort, where the wrong is contrasted with the ensuing losses: on that model, the abstract loss of privacy ought not to be compensated separately. Conversely, the compensation of the right-diminution itself entails switching to a ‘unipolar’ model, whereby wrong and loss collapse onto one another, rendering redundant the redress of harms flowing directly from it. The law of privacy shows itself to be a battlefield between these two analytical frameworks, where the temptation to combine the approaches is a constant one. *Part III* examines four consequences the choice of model has on (i) the privacy of juridical persons, (ii) that of non-sentient beings, (iii) the meaning of loss in privacy actions and (iv) the relationship between compensating and vindicating the right to privacy.

keywords: privacy, loss, harm, distress, compensation, vindication, rights

Introduction

This article has two aims, one narrow and relatively simple; the other wider and more ambitious. The narrow aim is to identify the various types of harm that the claimant can – at least potentially – seek redress for in an action for breach of privacy.¹ This simply entails looking at the decisions that were handed down on that basis and examining what courts have said, tidying up the language to avoid unnecessary

* Reader in European Private Law, University of Edinburgh. A preliminary version of this paper was presented at a conference on ‘The *Campbell* Legacy: A Decade of “Misuse of Private Information”’, that was held at Newcastle Law School on 17 April 2015. Thanks are extended to Daithí Mac Síthigh for the invitation and to the participants, in particular Nicole Moreham and Hugh Tomlinson, for their helpful comments. A fuller version of the paper was also presented at the University of Otago and the Victoria University of Wellington on 16 and 21 July 2015, where again I benefited from the ensuing discussions.

¹ This article is not interested in non-monetary remedies, like injunctions. Within damages (money awards) it also ignores exemplary damages, to which courts have all but closed the door in privacy actions (*Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20, [210]), and restitutionary (disgorgement) damages, which it has been argued should be allowed (Normann Witzleb, ‘Justifying Gain-based Remedies for Invasions of Privacy’ (2009) 29 *Oxford Journal of Legal Studies* 325). Aggravated damages are regarded as a species of compensatory damages which do not raise separate issues. The focus of this paper is decidedly on *compensatory* damages. A difficulty, however, is that how far a money award can be described as compensatory for loss depends on how broadly the notion of loss is construed. When loss is defined in a narrower way, this will open up a gap which some have tried to fill by resorting to the concept of vindicatory damages (see below, 21). On the basis of the more extensive understanding that this paper defends, however, there is as will be seen no need for this separate response. However the word ‘redress’ is used as an umbrella term for both compensation and vindication so as not to beg the question that the non-punitive and non-restitutionary damages in privacy actions are necessarily compensatory.

duplicates. What will be argued is that they are of three sorts: pecuniary loss, mental distress and loss of privacy considered in itself. The broader ambition is to rationalise the way the law thinks about such harms, losses or injuries. This is much more difficult because it requires understanding the underpinning structures of tort law on which these various heads of damages are – implicitly – predicated. Here, the argument will be that the sorts of harm courts have claimed to compensate expose the wrong² of breach of privacy as the main battlefield between two models of tort law, which carry two ways of understanding the relationship between wrong and loss: a dominant one, described as ‘bipolar’, which contrasts the wrong with the loss or losses that flow from it; and another – ‘unipolar’ – model which conflates the wrong and the loss, i.e. identifies the loss with the violation of the protected right. Distress and pecuniary loss, it will be argued, are tied to the former model, whereas loss of privacy is wedded to the latter; the important point is that we ought not to combine them because they answer to two conflicting rationalities.

This broader point will require a general analysis of tort law, the significance of which is in no way restricted to actions for breach of privacy.³ But privacy⁴ actions are of particular interest in this respect because they constitute possibly the clearest battlefield between the two models; and the recent case of *Gulati v MGN*,⁵ now the leading judgment concerning quantum of damages in English privacy law (on which this article focuses), shows them coming to a head in an especially clear way. As will be explored in the final part, the choice between the two models has a number of implications for the shape of this fledgling area of the law, in particular the (highly disputed) question of whether juridical persons have a right to privacy and the possibility of ‘vindicating’ the right to privacy, which itself relates to the understanding we have of loss (in the sense of the detriments the law seeks to compensate) in the context of privacy actions.

I. Three Heads of Detriment

1. A note on terminology

We begin in this section by examining the various detriments that the claimant in a privacy action might have suffered and seek compensation (or more generally, redress) for. ‘Detriment’ is a convenient word to start with because it is not a term of art and usefully conveys the idea of worse-offness at its broadest; but it is not proposed to press it into service in any particular technical sense because, in an already crowded toolbox, it is in all but the most unusual circumstances ill-advised to introduce yet further competitors: what the law needs is for the meaning of key words to be stabilised (so that, in turn, concepts can be articulated with precision), not for writers to add to the confusion by putting forward additional terms.

² The word is used here in the sense of civil wrong. Whether it is a tort *stricto sensu* has been disputed but now seems to have been settled authoritatively (and, to my mind, correctly) in the affirmative: see *Google Inc v Vidal-Hall* [2015] EWCA Civ 311, [2015] CP Rep 28, [43]: ‘if one puts aside the circumstances of its “birth”, there is nothing in the nature of the claim itself to suggest that the more natural classification of it as a tort is wrong’.

³ In an English context ‘breach of privacy’ means misuse of private information, English law only recognizing at this stage the violation of one particular type of privacy, namely, informational privacy. Insofar as the arguments developed in this article are not tied to that species of invasions, it is however better to use the broader label.

⁴ ‘Privacy’ is used here, and frequently through this article, as shorthand for ‘breach of privacy’: an incorrect but useful and now well-established shortcut.

⁵ *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), unreported.

The difficulty is that, naturally, none of the possible candidates – ‘loss’, ‘harm’, ‘injury’, ‘damage’ and possibly others (e.g. ‘prejudice’) – have a stable meaning. ‘Damage’ has too much of an overtone of the sort of physical corruption we contemplate when we speak of ‘damage to property’ to be useful. ‘Injury’ is unsuitable in the present context for the very same reason that ordinarily makes it a convenient label for scholars, namely, its constant oscillation – and refusal to choose – between the wrong and the consequences of the wrong. There remain ‘loss’ and ‘harm’. It seems fair to say both that ‘harm’ is the less cogently defined of the two (because it is the less technical one, ‘loss’ being the main term of art that lawyers have pressed into service) and also that it is wider, in the sense that there are many situations where it is easy to imagine lawyers being happy to use it but not to speak of ‘loss’, whereas the opposite would not appear to be true. Situations of detriments referred to as ‘abstract’, ‘legal’ or ‘normative’ losses spring to mind, such as loss of autonomy, of use or of privacy considered in themselves: while (as the very labels suggest) *some* would be happy for the word ‘loss’ to be used – if perhaps always with a qualifier –, equally it is clear that many would take argument with such a ‘strained and artificial’⁶ use of the term. To avoid using question-begging terminology when examining issues which, as will be seen, largely hinge on how broadly the notion of ‘loss’ is construed, the word ‘harm’ is being preferred in this paper, at least as a starting point. It will be used interchangeably with ‘loss’ in its broadest sense: that of any detriment, i.e. any actualisation of real-life events which make the claimant worse off than he would have been without the conduct complained of.

Against this background, an examination of the cases shows that there are three, and only three, types of harms that the law of privacy concerns itself with.⁷ They are: (i) pecuniary loss, (ii) mental distress and (iii) the loss of privacy itself. The only complication is that the terminology used is unstable; but it should not be difficult to accept that they are distinct clusters exhausting the field and also that no further meaningful distinction can be made within these clusters.

2. Pecuniary loss

There is no particular significance attached to the above order; it is simply one of convenience. Pecuniary loss comes first because it is the most obvious type of loss generally: as has been rightly remarked, it lies at the heart of the concept of loss –⁸ to the point where, still today, the idea that loss that is not directly valuable in money is not ‘real’ or ‘proper’ loss never lies deep below the surface of the law. On the other hand, no-one would want to deny that such injuries to the pocket are loss (naturally there might be disputes as to whether they are *wrongful* losses, but this is an entirely distinct question).

It is therefore striking that, in the context of privacy claims, pecuniary loss – i.e. economic loss, whether direct or consequential – tends to be noticeably absent. It is rarely even pleaded, and it is questionable whether it has in fact ever been redressed using this cause of action. While proving negatives is always difficult, it is striking that the leading authority in the English-speaking world, *Tugendhat and Christie’s The Law of Privacy and the Media*, only references one privacy case under that heading – the *Douglas v Hello!* saga, where damages were awarded for ‘the expected

⁶ A phrase used by Lord Nicholls in *Attorney General v Blake* [2001] 1 AC 268, 279.

⁷ Naturally this does not mean that they will all be present in each case: indeed, if the argument in this paper is correct, they should never all co-exist.

⁸ Andrew Tettenborn, ‘What is a Loss?’, in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (Hart 2007) 441, 443.

revenue which would have come from the editions carrying the authorized wedding exclusives as they were originally planned by the publisher’ –⁹ even though this case was *not* in fact an instance of economic loss consequential on breach of privacy.

The plaintiff couple in that case, Michael Douglas and Catherine Zeta-Jones, sued ‘Hello!’ for publishing unauthorised photographs of their wedding in New York: a clear breach of their privacy which, given their celebrity status, also caused economic loss to a third party, ‘OK!’, who had secured the exclusive right to publish a selection of approved photographs. As a result they sold fewer copies of their magazine than they would otherwise had, some of the public’s appetite for the event having already been satisfied by their competitor. ‘OK!’ consequently sued for damages alongside the celebrity couple. But in no sense was their economic loss, for which damages were ultimately awarded (the House of Lords reversing the decision of the Court of Appeal, which had itself overruled the trial judge) consequential upon a breach of privacy. For one thing, of course, any privacy right would have been the Douglasses’, not the magazine’s. Besides, and more fundamentally, the fact that the published photographs concerned a private event was a mere happenstance; what mattered to the claimant magazine was that it was confidential information. That point was put with utmost clarity by Lord Hoffmann in the House of Lords, speaking for the majority on that point:

It is ... necessary to avoid being distracted by the concepts of privacy and personal information ... [T]his appeal is not concerned with the protection of privacy. Whatever may have been the position of the Douglasses ... “OK!’s” claim is to protect commercially confidential information and nothing more. So your Lordships need not be concerned with Convention rights. “OK!” has no claim to privacy under article 8 nor can it make a claim which is parasitic upon the Douglasses’ right to privacy. The fact that the information happens to have been about the personal life of the Douglasses is irrelevant. It could have been information about anything that a newspaper was willing to pay for.¹⁰

If the economic loss was actionable, therefore, it was not *qua* consequential upon a breach of privacy but rather because it flowed from another wrong: either breach of confidence (the solution adopted by the House of Lords) or one of the twin economic torts of inducing breach of contract and causing loss by unlawful means (which were discussed but rejected by the Court). In other words, the same set of facts – the taking and publishing of the photographs – gave rise to more than one cause of action; and while the economic loss arose from the same facts as those which made out the action for breach of privacy, and subsequently to it, it was not in any sense consequential upon that wrong. *Post hoc sed non propter hoc*.

Nonetheless, it is very difficult to deny that economic loss could potentially arise in a privacy case – which would however seem to be necessarily consequential rather than direct – and that, if it did, it should and would be recoverable on the usual conditions. If nothing else, this could be because the privacy-infringing information is also defamatory of the claimant:¹¹ defamatory statements do by nature have a

⁹ Mark Warby, Nicole Moreham and Iain Christie (eds), *Tugendhat and Christie’s The Law of Privacy and the Media* (2nd ed, OUP 2011) §13.95. I am grateful to Dr Moreham for having allowed me advance access to the relevant sections of the as yet unpublished third edition, which remain unchanged.

¹⁰ *Douglas v Hello! Ltd (No 3)* [2007] UKHL 21, [2008] 1 AC 1, [118] (conjoined appeal with *OBG Ltd v Allan and Mainstream Properties Ltd v Young*).

¹¹ If it is both, suing in privacy would allow, for instance, to bypass the defence of truth.

tendency to cause economic losses, since they are liable to cause others to think less well of the claimant, and oftentimes these third parties will respond by modifying their behaviour in such a way that his pocket will suffer. This would amount to economic loss consequential upon the breach of privacy.¹²

3. Mental distress

The second type of harm that can be identified in breach of privacy actions is mental distress in the broadest sense of unpleasant emotions. It does not pose significant analytical difficulties: as long as one accepts that mental distress can at least potentially occur in privacy cases (which is self-evident) and that this detriment counts as a harm (which would also be fairly obvious on the basis of the definition sketched out above), then it is aptly described as one of the ‘harms of privacy’. Indeed privacy cases are dotted with references to such harms, from ‘distress’¹³ to ‘hurt’ or ‘injured’ ‘feeling[s]’,¹⁴ to ‘pain’,¹⁵ ‘embarrassment’¹⁶ or ‘humiliation’.¹⁷ (The more interesting question in that context really is whether there is, or could be, *any* successful action in privacy in the absence of such harm, a point that is returned to below).

The only slightly difficult issue is that of labels. As can be seen, a variety of terms have been used by courts to describe what Peter Handford calls ‘unpleasant emotions’.¹⁸ Without going as far as suggesting that they are all interchangeable, which is clearly not the case, it is equally clear that courts do not have a particular taxonomy of such emotions in mind when they use the above terms, whether in isolation or in combination. Rather, congruent with ordinary language, they are pressed into service in an unsystematic way to approximate the underlying (and always complex) spectrum of human emotions at play. It does not seem that any injustice is being done to them if we say that all of the above labels boil down to an idea of emotional disturbance or upset. In turn, the term ‘mental distress’, which is both broad and commonly used, seems as good a term as any to operate as an umbrella category encompassing them all. (‘Mental harm’, ‘loss of happiness’, ‘sentimental harm’ or ‘emotional harm’ would also be suitable labels, the main point being one of consistency.) The interest that is being considered here, through its various disruptions, is that in emotional tranquillity or wellbeing. Accordingly the focus is on the internal consequences of the wrong suffered on the mind on the claimant.

4. Loss of privacy

¹² Still, such a scenario would in a very real sense be a quasi-defamation action, i.e. it would be an action clothed in the appearances of a misuse of private information claim, but where the gist of the plaintiff’s grievance would be that it reflected detrimentally on him. Outside of these cases, i.e. in ‘pure privacy’ cases, it is actually difficult to imagine how economic loss could truly be said to be consequential on the informational misuse (as opposed to arising sequentially from the same set of facts). This cannot be pursued here but the point is worth noting.

¹³ E.g. *Gulati* (n 5), [168]; *Mosley* (n 1), [216], [224]; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [33], [34].

¹⁴ E.g. *Gulati* (n 5), [169]; *Mosley* (n 1), [216].

¹⁵ E.g. *Campbell* (n 13), [33].

¹⁶ E.g. *Mosley* (n 1), [235]; *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), [2014] EMLR 24, [196]; *Campbell* (n 13), [75].

¹⁷ E.g. *Campbell* (n 13), [75].

¹⁸ Peter Handford, Nicholas Mullany and Philip Mitchell (eds), *Mullany and Handford’s Tort Liability for Psychiatric Damage* (2nd edn, Lawbook Co 2006) 56-7.

The third type of harm that one encounters in privacy cases would be, perhaps tautologically, the injury to the claimant's privacy itself: his 'loss of privacy' to use a phrase that is in common usage, even though many would probably want to deny that, in and by itself, it is in fact a loss (although it most certainly is a harm in the above sense of detriment). The best two judicial illustrations of loss of privacy being a compensable harm are probably to be found under the pen of Mann J in *Gulati*, when he wrote that damages in a privacy action 'should compensate not merely for distress ... but ... also ... for the loss of privacy ... as such',¹⁹ and that of Dingemans J in *Weller*, who considered that 'damages for misuse of private information should compensate the [c]laimants for the misuse of their private information',²⁰ in other words, for the loss of (or injury to) their privacy itself.

Again, there are terminological difficulties. In particular, the right or interest of the claimant's whose violation is characterised as the harm can be phrased in different ways and, besides loss of privacy, courts have also spoken of 'loss of autonomy'.²¹ 'Autonomy' (literally, the state of being a law unto oneself) is a complex and multifaceted concept but, in the present context, it seems clear that it is not meant to describe a different injury from the injury to privacy. Either the two words are used as synonyms, as in *Gulati*²² or – a doctrinally more suitable interpretation to my mind – autonomy is to be regarded as a higher-level interest, of which privacy would constitute one species among potentially many others.²³ On both readings, the injury to privacy constitutes ipso facto the injury to autonomy and the two need not be distinguished (indeed they should not, lest the same injury be counted twice).

What matters for the present purpose is to identify this head of detriment as separate from the previous one. This should not be controversial, for loss of privacy or autonomy is not – certainly not directly – a form of emotional disturbance. It is defined abstractly in terms of the loss of the 'good' represented by the protected interest, here privacy, not concretely in terms of the emotional disruption suffered by the claimant. While some difficulty in the relationship between the two might be immediately perceptible (and will be returned to in part II), this has to be our starting point: the two notions are clearly distinct in their self-understanding.

5. 'Loss of dignity'?

It was argued at the outset that there were three types of relevant harms in privacy actions. The reason why a fourth heading on 'loss of dignity', a label that appeared in particular in *Mosley*²⁴ and in *Gulati*,²⁵ is nonetheless included here is that, whilst it does not in fact amount to a separate type of loss or detriment, this is not immediately apparent and therefore deserves separate treatment.

¹⁹ *Gulati* (n 5), [168].

²⁰ *Weller* (n 16), [192].

²¹ *Gulati* (n 5), [108], [111], [168], building on *Campbell* (n 13), [50] and *Mosley* (n 1), [7].

²² This is transparent from the language used in the judgment, e.g. [168]: 'the loss of privacy or autonomy as such'.

²³ This would seem to be the approach in *Mosley*: 'The law now affords protection to information in respect of which there is a reasonable expectation of privacy ... That is because the law is concerned to prevent the violation of a citizen's autonomy ...' (at [7]). The view that autonomy is an overarching principle underpinning most, if not all, other rights is a fairly common one, see e.g. Robert Stevens, *Torts and Rights* (OUP 2007) 339.

²⁴ *Mosley* (n 1) [216], [224].

²⁵ *Gulati* (n 5), [141] (also, in combination with the words 'damage' or 'affront' rather than 'loss', [108] and [168]). At [108], 'dignity' is implicitly equated with 'standing'.

Analytically, there are three ways loss of dignity as harm can be interpreted, none of which makes it a distinct species. The first possibility is that it should be interpreted as being the loss of privacy, as already encountered, reframed at a higher level of generality (similarly to ‘loss of autonomy’). On that reading, privacy would be one dignitary interest among others; and saying that the claimant suffered a loss of his privacy and a loss of his dignity would be describing the same harm in two different ways, using either a specific or a more general term (like describing someone as ‘a Yorkshireman’ then ‘an Englishman’). The second possibility is that it would describe a concrete harm: ‘loss of dignity’ as ‘indignity’ in the non-legal sense of humiliation. Literally, to be humiliated is to be brought down to the ground (*humus*), that is to say, losing one’s status as an upright human being. On that alternative reading, loss of dignity would now count as a type of mental distress, as defined above. Finally, the third possibility is that it would be a combination of these two.

All three understandings can be seen to surface in the case law. Dangerous though it might be to read too closely judgments which did not mean to consider the question in any great detail, it would seem that *Mosley* leans towards the second interpretation²⁶ and *Gulati* stands somewhere between the second and the third,²⁷ whereas Lord Hoffmann in *Campbell* appears to have had the first meaning in mind when he held that ‘private information [is] something worth protecting as an aspect of human autonomy and dignity’.²⁸ Whichever is correct, what matters for the present purpose is that, one way or another, loss of dignity is reducible to other types of harm. It is neither necessary nor desirable to carve out a further category to accommodate it.

6. Relationship

The above survey identified, behind the various labels that courts (and scholars) might use, three – and only three – types of harm that can be redressed, at least in principle, in privacy actions: pecuniary loss, mental distress and loss of privacy. If we used a common dichotomy we would classify the first one as ‘pecuniary loss’ and the other two as ‘non-pecuniary losses’.²⁹ But, besides being uninformative in that the second class is defined in a purely residual way, this would also suggest that these heads of detriment operate on the same level and can all be compensated if and when they arise: neither of which, as will be seen, is (or at least should be) true. Instead the distinction should be between, on the one hand, two concrete harms – the injury to the claimant’s wallet (pecuniary loss) and the injury to his emotional wellbeing (distress) – and, on the other hand, an abstract harm: the loss of privacy per se, i.e. considered in and by itself. How the relationship between these three heads of detriment should be understood in a principled way is a difficult question that will form the basis of the

²⁶ This is implied in Eady J’s words, where three notions are reduced to two and then one, as if the various phrases were interchangeable: ‘damages for such an infringement may include *distress*, *hurt feelings* and *loss of dignity*. The scale of the *distress* and *indignity* in this case is difficult to comprehend. It is probably unprecedented. Apart from *distress*, there is another factor which probably has to be taken into account ...’ (*Mosley* (n 1), [216], emphasis added).

²⁷ *Gulati* (n 5), [168]: ‘I have already found that the damages should compensate not merely for distress (still using that word as a shorthand, as described above), but should also compensate (if appropriate) for the loss of privacy or autonomy as such arising out the infringement by hacking (or other mechanism) as such. (This may include, if appropriate, a sum to compensate for *damage to dignity* or standing, *so far as that* is meaningful in this context and *is not already within the distress element*.)’ (emphasis added).

²⁸ *Campbell* (n 13), [50].

²⁹ As e.g. in *Tugendhat and Christie* (n 9), ch. 13D.

next part. By way of preliminary, this final section simply examines the way courts have in fact articulated them, implicitly or explicitly. Pecuniary loss having, it seems, never been successfully claimed in a privacy action, this means looking at how the other two heads, distress and breach of privacy, are treated by courts.

Cases can be put on a spectrum in this respect. At one end would stand those judgments that were dealt with using the exclusive language of distress, i.e. with no suggestion being made that (absent economic loss) any other injury has been suffered by the claimant. *Campbell* is a case in point.³⁰ At the other end of the spectrum one would place the action of the Weller twins, whose case was adjudicated without any reference to actual or potential emotional consequences that the taking and publishing of photographs of them might have caused, and who recovered substantial damages on the sole ground that their privacy had been invaded. In the middle are those judgments where not only both considerations (distress and breach of privacy) were present as part of the factual and legal background to the verdict, but damages were explicitly granted to redress both (whether ‘both’ means two separate injuries or one injury with two heads, which is immaterial for the present purpose). The case of the oldest Weller child, who was recognised to also have suffered ‘real embarrassment’³¹ (besides the misuse of her own private information), and that of Max Mosley, are good examples. In the latter case it was held that, as well as compensating for the emotional consequences of the injury, damages should also ‘mark’ the infringement of the right to privacy,³² whatever exactly that might have meant.³³

What a survey of relevant cases shows is that whether what we have here is one head of damages known under two names, or two separate heads which are always remedied, or two separate heads which may or may not be both redressed – whether or not through compensation – depending on the circumstances of the case, has to put it mildly no clear judicial answer. Perhaps the best illustration of the muddle, and constant to-ing and fro-ing, that courts have walked themselves into is provided by the key paragraph pertaining to quantum of damages in privacy actions in *Gulati* which, although a first instance judgment, is the leading case on the question to date. What made the case especially difficult (and interesting for the present purpose) was that the celebrity claimants whose phone had been hacked by News of the World remained unaware of it until the affair blew up and hence suffered no distress while the wrongs were being committed. Mann J, considering the basis on which the award of damages should be made, opined:

the damages should compensate not merely for distress ... but should also compensate (if appropriate) for the loss of privacy or autonomy as such arising out of the infringement ... (This may include, if appropriate, a sum to compensate for damage to dignity or standing, so far as that is meaningful in this context and is not already within the distress element.)³⁴

From this paragraph it would appear that we need to compensate distress but also loss of privacy per se *if appropriate* (what does that mean?); and that damages for loss of

³⁰ *Campbell* (n 13), e.g. [33], [34], [75], [81], [98], [124], [130], [158], [168] [169]; cf, in the Court of Appeal ([2002] EWCA Civ 1373; [2003] QB 633), [55] and, in the High Court ([2002] EWHC 499; [2002] EMLR 30), [1]-[2] (‘Miss Naomi Campbell ... seeks damages for breach of confidentiality ... She claims that ... she suffered distress, embarrassment and anxiety’), [141].

³¹ *Weller* (n 16), [196].

³² *Mosley* (n 1) [216].

³³ On which see below, 21.

³⁴ *Gulati* (n 5), [168].

privacy *may* (not ‘must’), *if appropriate* (ditto), include damages for loss of dignity, *provided* this has not already been compensated for under the first head (when would that be the case?). One could be forgiven for not understanding what the logic of the law is on these points, or doubting that there in fact such a logic that can be understood.

II. Two analytical frameworks

What the second part of this article seeks to argue is that the principal reason why the law struggles to understand the way these various harms, losses or detriments relate to one another is that it has been meandering, in the context of breach of privacy, between two analytical models of the law of torts which entail two very different understandings of the relationship between, on the one hand, the wrong that triggers a cause of action and, on the other hand, the harms or losses which damages seek to redress. (The existence of these two models and the competition between them are, as mentioned, not restricted to the law of privacy; but this tort does constitute the clearest battlefield between the two models and hence the best context in which to introduce and analyse the conflict.) Because the law is only dimly aware of the existence of these two opposing models and the way they clash, it has found itself unable to understand – and therefore to resolve – its own difficulties in terms of identifying and quantifying harms in privacy cases.

1. The ‘bipolar’ model: wrong and ensuing loss(es)

On the arch-dominant model on which English tort law³⁵ operates, the wrong will be clearly contrasted with the losses³⁶ that ensue. The wrong is the actualisation of real-life events which give the claimant a tortious cause of action: in modern scholarship, this is typically described as a violation of – or injury to, encroachment upon – a right or, conversely, the breach of a duty owed to the claimant. The losses, on the other hand, are detriments which flow from the wrong and are therefore, by construction, distinct from it. The point might sound too obvious to be worth labouring, but it needs to be highlighted in anticipation of what follows: there is on the one hand the violation of a right and on the other hand the detriments that ensue. It is these detriments that money awards granted to the successful plaintiff seek to compensate. While the wrong naturally needs to be there, because it is what makes the ensuing losses wrongful (hence liable to be remedied), it is in itself transparent. The law does not seek to redress the wrong but to blot out, as far as money can do, its consequences.

In turn, these losses are typically thought of as being of two sorts: pecuniary and non-pecuniary, depending on whether they are directly valuable in money or, to put the same point in ordinary language, whether they leave the claimant ‘out of pocket’ or not. This is not controversial. Slightly more contentious, but important, is the idea that all non-pecuniary loss boils down, in the final analysis, to mental distress in the broad sense of the term (i.e. a disruption of the claimant’s emotional well-being, irrespective of the specific label used by courts). The point was recognised in particular by Andrew Burrows, who argues that ‘ultimately all non-pecuniary loss is

³⁵ Though not only English law: the rest of the common-law does not appear to be any different; indeed it dominates the civilian tradition as well.

³⁶ Because, as will be seen (below, 19), this model is wedded to a narrower, and uncontroversial, definition of loss, it is entirely appropriate to use the word – preferably to ‘harm’ – in this context.

concerned with the claimant's distress or loss of happiness'.³⁷ It is also implicit in the categorisation of non-pecuniary losses adopted by the leading English authority on the topic, *McGregor on Damages*, where the authors distinguish between four types of non-pecuniary losses, which can all be seen as forms of emotional disturbance: (i) 'physical inconvenience and discomfort'; (ii) 'pain and suffering and loss of amenities'; (iii) 'mental distress' and (iv) 'social discredit'.³⁸ Accordingly we have on the one hand damage to the claimant's wallet (his 'having') and on the other hand damage to his emotional tranquillity (his 'being').³⁹

There is no need here to trace the genealogy of this model in any detail, but it can already be seen to operate in the Roman action on the *lex Aquilia* (the ancestor of the general principles of liability for harm caused by fault in modern civilian legal systems, which has also had a not inconsiderable influence on the English tort of negligence). The action, which visited certain types of damage to property, distinguished sharply between the tangible injury (*corrumpere*) caused to the thing (*res*) and the financial detriment that flowed from it (the *damnum*). The wrong was the causation of physical damage but the loss redressed by the law was the *damnum*, with this important consequence that if no loss ensued, no money award would be granted – a famous example being that of a castrated slave boy, whose value actually went up when he (in law, a *res*) was damaged.⁴⁰

2. The 'unipolar' model: wrong as loss

While the above framework undoubtedly dominates the law, there exists another model of tort lurking in the background, clearly a minority position but making increasingly significant inroads into the modern law.⁴¹ On that model, the wrong and the loss – to use a terminology sometimes resorted to in that context, the *iniuria* and the *damnum* – collapse onto another, to the effect that the loss becomes the violation of the right. The detriment that the claimant has now suffered is that he has been wronged. Rights – typically thought of in that context as a list of protected interests, i.e. of 'goods' to which humans aspire, such as 'liberty, physical integrity, land,

³⁷ Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 31

³⁸ Harvey McGregor *et al.* (eds), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) §5-003. 'Amenities' means 'pleasures'. By construction, we are not concerned here with any pecuniary consequences of these disturbances, which are being dealt with as part of pecuniary loss.

³⁹ Naturally both need not be present each time, either because they did not occur on the facts of the case or because the law does not recognize that one type of loss is recoverable when it flows from a given wrong or injury.

⁴⁰ D.9.2.27.28 (Ulpian, 18 *Edict*): 'Further, if someone castrates your slave-boy and thus increases his value, Vivianus writes that the *lex Aquilia* should not apply, but that you should instead bring the action for insult or sue under the edict of the aediles for four times his value' (tr. Watson Digest).

⁴¹ This is not the place to speculate at length over the reasons. Two obvious factors that would have played a role are, on the one hand, the universally observable tendency of the law to redress more harms as it develops, especially harms of a non-tangible nature (which might not be readily accommodated under the requirement of loss in the usual sense of the term) and, on the other hand, the rise and rise of the language of rights in the common-law tradition over the last 20 years – in particular following the publication of Ernest Weinrib's *The Idea of Private Law* (Harvard University Press) in 1995 and, in the UK, the passing of the Human Rights Act in 1998. While the wedge drawn by people like Robert Stevens between rights-based and loss-based theories of tort is to my mind a false dichotomy, it is nonetheless easy to see how the terminology of rights leads directly to an idea of compensation, or redress, for the violation of the right itself, hence the use of such language as 'substitutive' or 'vindicatory' damages.

possessions, reputation, wealth, privacy [and] dignity’ –⁴² form a sphere of protection around the plaintiff: as he gets physically injured, defamed or imprisoned, as his wealth is depleted, his chattels damaged or his privacy violated, he suffers a diminution of these ‘good things’. His interests have been invaded and that *is* the detriment, harm or loss that he has suffered. There is, on this model, not two levels of enquiry but one. The harm that the law redresses is not the noxious consequences of the wrong, it is the wrong (right-injury) itself.

Like the first one, this ‘unipolar’ model has an old pedigree. It can be traced back to the high scholastics, who understood harm as the taking away of what belongs to a person, his ‘goods’, whether the good – in modern parlance the protected right or interest – be in his chattels, his person, his dignity or the relationship he has with another person.⁴³ Grotius’ definition of *damnum*, loss, in his *Law of War and Peace* (1625) captures the gist of that alternative model most concisely: he suffers a *damnum, quis minus habet suo*, i.e. ‘who has less than what is his’, that is to say, in this context, ‘less than his right’.⁴⁴ The right that has been violated, encroached upon, abstracted, *diminished*, must be restored either in nature (hence such ideas as restoration of honour through forced apologies) or by equivalent.

Before we can return to the way these two models are going to play out in the context of breach of privacy, we need to explain how they relate to one another and also why they ought not to be combined. The latter point, in particular, is crucial to the argument developed in this paper.

3. Connecting the two models

These two models described as respectively bipolar and unipolar, because the former relies on two separate elements – the wrong (*iniuria*) and the loss (*damnum*) – whereas the latter conflates them, aim to explain the totality of the law of torts. They are two analytical frameworks aspiring to making sense of it as a whole. To use a simple analogy, they are like the imperial and the metric systems, which are both capable of accounting for any measurement in the physical world but operate on two parallel planes. These ought not to make contact lest units from the one are added to units from the other, resulting in nonsense.

When it comes to length, the conversion mechanism is simple: given e.g. any distance expressed in miles, dividing it by 1.609,344 will give us the equivalent in kilometres. The process is more complicated when it comes to the bipolar and unipolar models of tort, but a similar exercise of ‘conversion’ must be carried out to understand how each makes sense of the other.

a) Conversion from the unipolar to the bipolar model is straightforward enough. The bipolar model accepts the existence of the wrong as a necessary requirement but, as was said, does not regard it as a compensable injury itself. It looks to the consequences of the wrong, not to the wrong itself, which is simply a peg that allows the subsequent losses to be wrongful and hence actionable. The underlying logic is that, once the (concrete) consequences of the wrong have been redressed, as far as

⁴² This is Tony Weir’s list: ‘There are several good things in life, such as liberty, physical integrity, land, possessions, reputation, wealth, privacy, dignity, perhaps even life itself. Lawyers call these goods “interests”.’: Tony Weir, *A Casebook on Tort* (10th edn, Sweet & Maxwell 2004) 6.

⁴³ Thomas Aquinas, *Summa theologiae*, II.II, Q. 61, art. 3; cf. James Gordley, *The Jurists* (OUP 2013) 86.

⁴⁴ Hugo Grotius, *De Iure Belli ac Pacis* (Blaeu 1646) 2.17.2.

money allows, then the wrong itself has been blotted out in the eyes of the law and no further remedy does, indeed should, avail.

One logical consequence of this analysis is that, if losses of the relevant type (pecuniary loss or mental distress) are absent in the instance case, in that the wrong does not cause any such detriment,⁴⁵ no compensatory damages will be granted. On this model either no action will lie at all, or a different remedy will avail (for instance nominal damages, which mean to recognise the existence of the wrong but deny, by definition, that any loss was caused).⁴⁶ Indeed, one strong incentive to switch over to the alternative model would be the refusal to accept that logical consequence, i.e. the desire to grant substantial damages in situations where no loss in the above sense is present.⁴⁷

b) How to translate the bipolar model into the unipolar one is rather more complex, but it needs to be sketched out if we are to understand its logic (which, it must be emphasised, is dictated by the need to make sense of the law as it currently stands: it is an exercise in interpretation, not in devising an alternative system from first principles). The first step is to distinguish, among all the consequences of the right-invasion, those which are described by the law as ‘consequential’ from those which are not. Consequential loss – almost always pecuniary, though it could in principle be of any sort – is loss that is one step removed from the wrong. This can be contrasted with ‘direct’ loss that flows immediately from it. Where the line is drawn is a complex question which has no authoritative answer, but it needs to be looked into in the present context. In most instances it will be clear-cut: for instance if you smash my car and as a result I have to spend £2,000 in repairs, that sum counts as direct loss: the need for repair is, of course, a consequence of the wrong, but it is not consequential loss in the technical, and narrower, sense of the term. On the other hand if, being a cab driver, I lose a further £5,000 in earnings while my car is immobilised, that additional loss counts as consequential loss.

If we leave aside for now those further losses, the way the unipolar model would re-interpret the consequentialist thinking of the dominant bipolar model would be by treating the direct ‘flowing’ loss as the *flipside* of the right-violation itself. In other words, by directly compensating for the diminution of the right, that is to say, by putting a monetary value on the amount by which it was reduced, the law indirectly compensates for these direct losses, both to the wallet and to feelings, whenever they are in fact present. Once the right has been compensated for, the direct consequences of its infringement are regarded as made up for and the claimant cannot additionally recover for them, which would amount to double recovery.⁴⁸ In the above

⁴⁵ A complication is that the law can analyse or value these harms differently. For instance, distress could be understood as the particular claimant’s actual distress or the distress that would be experienced by an ordinary claimant placed in the same circumstances.

⁴⁶ Conversely, of course, on the unipolar model any infringement of a right will warrant substantial compensatory damages for the harm represented by the wrong itself, irrespective of any (concrete) consequences.

⁴⁷ Below, 21.

⁴⁸ Aggravated damages complicate the picture but can be easily reconciled with that model on the understanding that the extra money award compensates for the additional distress caused by the defendant’s conduct, itself the flipside of the violation of another right of the claimant’s, which Birks called the right to a ‘proper share of respect’ and is violated when the defendant behaves towards the claimant in a hubristic way, denying him that right and causing him to feel humiliated (Peter Birks, ‘Harassment and Hubris: The Right to an Equality of Respect’ (1997) 32 *Irish Jurist* (new series) 1, 14).

example, the law would likely value the right-diminution at £2,000 (or a little more to take into account the associated distress, provided its availability is recognised in that context, which is not entirely clear as the law stands).

There remains non-direct, i.e. consequential, loss, for instance the £5,000 in the above scenario. Here, we know that as a matter of law these are recoverable according to general principles, in particular in terms of causation and remoteness, and so they can be claimed on that basis. However, on the logic of the unipolar model, the result is crying out for an explanation. If a loss is the violation of a right, the fact that further consequential loss suffered by the claimant is recoverable would seem to signify that it amounts to a *separate* wrong (i.e. the violation of another right). This cannot be explored further in the present context but it is interesting to note that this line of reasoning underpinned an important defamation judgment handed down by the Supreme Court of Appeal of South Africa in 2011. In that case, *Media 24*,⁴⁹ a taxi company sued a media defendant over defamatory incriminations they had published concerning the immoral and illegal behaviour of the claimant, seeking ‘general damages’ for the injury to its reputation and ‘special damages’ for the further economic loss (loss of profits) they had allegedly suffered as a result.

The Court held that they could recover in defamation (*actio iniuriarum* in a South African context) for their loss of reputation but, if they wanted to recover for the economic loss, they had to sue using a different cause of action (injurious falsehood which, in South African law, is regarded as part of the *actio legis Aquiliae*: a rough equivalent of the tort of negligence in England). Accordingly, in order to succeed, the claimant would need to establish the wrongful character of the economic loss according to the separate – and much more restrictive – rules of Aquilian liability/negligence. Although that point was hardly noted by the Court, the implication of this reasoning is that the economic loss is no longer to be regarded as consequential. It is now *pure* loss, corresponding to the violation by the defendant of the claimant’s interest in his wealth. Indeed, on the logic of the unipolar model, there is no such thing as consequential loss; each loss corresponds to a different injury, hence a different wrong, hence the violation of a different right.

4. Mixing and matching

From both systems’ ability – and, logically, their claim – to be an interpretative framework for all wrongs, it follows that (i) they ought not to be combined and (ii) it would, at best, be an unnecessary complication for the law to switch back and forth between them. This is the key point that needs to be accepted before we return to the application of these two models in the context of privacy claims.

On a principled level, adding, or moving between, secondary detriments recognised by the bipolar model (i.e. pecuniary loss and mental distress) and direct detriments on the unipolar one (any diminution of a right, for instance the loss of privacy) amounts to amalgamating objects which are ontologically different: events and their consequences, concrete losses and abstract losses. It is like adding apples and oranges or, to follow the previous metaphor, miles and kilometres. The flipside of this argument is that, practically, redressing both would amount to double recovery, that is to say, to counting the same injury twice: the first time as the diminution of a right, the second as the ensuing loss. Naturally there are all manner of complications to the argument, in particular because it depends on how right-diminutions are valued,

⁴⁹ *Media 24 v SA Taxi Securitisation* (437/2010) [2011] ZASCA 117; 2011 (5) SA 329 (SCA); cf. Eric Descheemaeker, ‘Three Keys to Defamation: *Media 24* in a Comparative Perspective’ (2013) 130 *SALJ* 435, 439ff.

and also on how systematically or not the law moves from one level of analysis to the other; but the gist of the argument, as the law currently operates, is straightforward enough and should not be difficult to accept. It can be illustrated with two examples, one from the ‘having’ side of the law (patrimonial loss) and the other from its ‘being’ side (mental distress).

On the having side, it is self-evident that, in the above example of the smashed car, if I recover £2,000 for the diminution of my property right, I cannot recover £2,000 again for the cost of repair: it would be redressing the same injury twice.⁵⁰ This is easy to see because, when it comes to pecuniary losses, they are directly valuable in money. On the other hand, in respect of non-pecuniary losses, which by definition are not directly so valuable, any award is bound to be arbitrary. This does not mean that they cannot be compensatory in a true sense of the term, nor that they are necessarily unfair or inconsistent, but it does make it very hard to prove that double recovery is at work. One good example to illustrate the issue can however be derived from the judicial *Guidelines for the Assessment of General Damages* – i.e. damages for non-pecuniary harm or loss – in *Personal Injury Cases*. To take one example at random, they tell us that ‘complete loss of smell and taste’ should lead to an award ‘in the region of £28,750’.⁵¹ We know that the £28,750 are compensatory and we know that they do not compensate for any pecuniary loss, which is assessed separately; but what are they meant to compensate for? The dominant answer seems to be for mental distress (called ‘pain, suffering and loss of amenities’, or PSLA, in the context of personal injuries).⁵² This is consistent with the bipolar model: it is the emotional consequences of the wrong which are redressed. An alternative analysis, however, would be to regard them as compensating for the physical injury itself (as indeed suggested by the phrasing of the *Guidelines*): having lost his sense of taste and smell, the claimant now has less of his physical integrity than he once did. His right has been diminished and the award values this loss; by compensating for the wrong itself, the law ipso facto compensates for its emotional consequences. The important point, which this example should make reasonably easy to accept because the amount the claimant will receive has been stabilised, is that it cannot be both/and. If the claimant recovers £28,750 for his distress, he cannot get more (leaving aside, again, the complication of aggravated damages) for the very fact that he was injured – and vice-versa.⁵³

5. Application to breach of privacy

We are now, finally, in a position to return to the particular cause of action under examination. As was said in the first part, there are three types of harm that are potentially redressable in privacy actions: pecuniary loss, mental distress and breach of privacy – all the other labels being reducible to one of these. To use an imperfect

⁵⁰ Cf. Stevens (n 23) 59ff., in the context of the discussion of what he calls ‘substitutive damages’, a theory which – despite marked differences – has strong overtones of the unipolar model.

⁵¹ Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (12th edn, OUP 2013) 20.

⁵² E.g. *Guidelines* (n 51) ix. This is an excellent example of presumed (indeed, deemed) distress.

⁵³ The alternative analysis does not appear to be followed in a pure way by any author, but a combination of both ways of thinking is not uncommon. For instance, *Charlesworth & Percy on Negligence* speaks of compensation for ‘the injury itself’, coming *in addition to* pain and suffering and loss of amenities as part of ‘non-pecuniary loss’ (C. T. Walton *et al.* (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014) §§5–93 – 5–94 (‘the injury by itself properly attracts an award of damages’)). On the purely bipolar model, on the other hand, the physical injury is in itself transparent; what matters is its consequences.

but helpful Latin terminology, we can call the first *damnum*, the second *solatium* (though *solatium* designates, in the later civilian tradition, the award granted ‘in solace for’ the suffering rather than the suffering per se) and the last *iniuria* (in the sense of the wrong itself).

If the argument that was developed in this part is correct the law can either, following the bipolar model, compensate for *damnum* and *solatium* – the *iniuria* being the peg, in itself transparent, on which the losses hang – OR it can, flipping over to the unipolar model, compensate for the *iniuria* and thereby, indirectly, compensate for all direct *damnum* and *solatium*.⁵⁴ In that context the *iniuria* means the breach of privacy, which itself is the flipside of the loss of privacy. It is important to emphasise that loss of privacy is not a loss (or harm) that flows, like distress or pecuniary loss, from the breach of the claimant’s privacy: rather it *is* the breach itself – the diminution of the claimant’s privacy – looked at from a different angle. It is analytically there by virtue of the wrong of breach of privacy having been committed: saying that one has lost some of one’s privacy is the same thing as saying that one’s privacy has been encroached upon.

The key to the present argument is, as mentioned, that these are – or ought to be – alternatives. Because the two levels of analysis (the wrong and its consequences) both seek indirectly to redress the other one, all three types of harm should not be compensated at the same time. If damages for *damnum* and *solatium* are granted, the claimant will have received full redress for the wrong he suffered (the above example of physical injury being directly transferrable to breach of privacy). Conversely, if the law grants substantial compensatory damages for the loss of privacy then, on the logic of this alternative model, it must be regarded as *having already compensated* for all direct losses, both pecuniary and emotional – there only remaining consequential (i.e. further) loss, in the unusual cases where such loss does in fact occur.

Response to an objection. One difficulty with this argument, and possibly the main reason why it might struggle to be accepted, especially by people who are solely interested in privacy (and perhaps closely related actions such as defamation, but are not tort lawyers generally) is that it would be entirely possible, in principle, to do things differently. The law *could* decide, in any successful action, to grant *x* by way of compensation for the breach itself – by reference not to its consequences but, perhaps, to its intrinsic gravity (or even a fixed sum) – and also *y* for the distress – assessed more or less objectively by reference to what an ordinary claimant would have felt like – in addition to *z* for any pecuniary loss if and when it arises. It would be possible to give one award for the breach per se and another award for its consequences, pecuniary or emotional. This would indeed appear to be the basis on which two Weller children got substantial damages for the wrong suffered, despite their complete unawareness that their privacy had been breached, while the eldest child got more because she *also* suffered distress.⁵⁵

This would be far from absurd on a principled level, but it would run against hundreds of years of legal development. The rest of the law of tort does not grant, nor has it ever granted, damages for the abstract wrong and additionally damages for its

⁵⁴ There would remain, as explained, non-direct (consequential) loss, but given that this is virtually bound to be economic loss – though one could, for instance, imagine a situation where the claimant became sick as a result of the breach of his privacy – and that, as explained, genuinely consequential economic loss is a rare (if at all existing) scenario in privacy cases, these losses can for all intents and purposes be ignored in the present discussion.

⁵⁵ *Weller* (n 16), [196]-[197].

concrete consequences. As was seen, the dominant model by far is to grant damages for the latter and consider that these indirectly blot out the wrong itself. Indeed, combining compensation for the wrong and for its consequences would not even be compatible with the rest of the law of privacy. For, on that logic, *all* claimants should get an award for the loss of their privacy, independently of – and on top of – any redress for distress, given that they have by definition suffered it. But even a cursory glance at the case law shows that this is not the case.⁵⁶ Regardless of its intrinsic merits (or lack thereof), the ‘both/and’ approach is incompatible with the existing law as it has developed over hundreds of years. The law of privacy should not tolerate the coexistence of incompatible models within its own midst, nor should it be allowed to harbour logics which throw the rest of the law into disarray.

III. Four consequences

Two important questions have been left almost entirely unaddressed so far: first, which model should the law of privacy adopt; second, what difference does it make which one we opt for? The first question would necessitate a separate treatment examining the entirety of tort law and accordingly will not be explored further in the present context, except insofar as it obliquely relates to the second. In this part, we look at four issues which are dependent on the choice made between the two models. On all four of these it will be argued that the unipolar model achieves results that are more satisfactory, which gives us at least some reasons to favour it. Yet the starting point has to be that, in most circumstances, the two models would reach the same results, because they are two ways of approaching the same injuries from different perspectives – both trying to do indirectly what the other does directly, namely, redress wrongs and compensate ensuing concrete losses. It is only in circumstances where a clear discrepancy arises between the wrong and the losses that flow from it that they will come to a head. However, if we accept that the law of privacy ought not to follow a micro-rationality of its own, apart from the mainstream of tort, the theoretical significance of choices that need to be made in our particular context is considerable, committing the law of civil wrongs as a whole (if not beyond).

1. The privacy of juridical persons

The first issue on which the choice between the bipolar and unipolar model would have a clear bearing is the question whether juridical (or ‘juristic’, ‘legal’, ‘artificial’) persons have a right to privacy, a question which continues to vex the law in a number of jurisdictions. While the link between the two is not mechanical, it is nonetheless very strong.

If we accept that non-physical persons are by construction incapable of experiencing emotions, it immediately becomes, given the centrality of damages for mental distress on the bipolar model, very difficult to understand how companies,

⁵⁶ There is one further difficulty which cuts across the previous ones. It is that the law could consider ‘emotional wellbeing’ as a separate protected interest standing level with the others. In that case, the same set of facts causing a breach of privacy and distress to the claimant would amount to the diminution of *two rights* hence two wrongs: the wrong of breach of privacy and the wrong of unlawfully causing distress (in which case, any damage for distress should be cut off from the law of privacy, or indeed any other cause of action, so as to avoid double-counting). Again it is conceivable but it is simply not the way the law works, save perhaps in exceptional, and therefore anomalous, circumstances. Happiness is not regarded as a protected interest in itself (which is why distress does not amount to sufficient damage for the purpose of the tort of negligence); rather it is parasitic on all other protected interests.

associations, partnerships and the like might enjoy a right to privacy. The argument against it would be that natural persons are granted such a right because they (ordinarily) suffer distress when their privacy is violated; because juridical persons are not susceptible to upset, it is at best not apposite – and at worst nonsensical – to grant them a right to privacy. This is indeed the basis on which a number of authorities have explicitly denied the existence of privacy rights for non-natural persons.⁵⁷

Admittedly the conclusion does not follow as a matter of analytical necessity. There are at least two ways the above argument could be circumvented, even while accepting the need for noxious consequences before an action is granted. First, by arguing that legal persons do in fact have feelings. This is not as evidently absurd as might first appear: if legal persons are held capable – through the ordinary rules of attribution – of signing a contract, willing an act, being in good or bad faith, and committing torts and crimes *personally*, it is not entirely evident why they cannot equally be attributed emotions. The second counter-argument is that, while juristic persons cannot be wounded in their feelings, they can evidently be injured in their wallet, and the right to privacy is meant to protect the latter as well as the former.⁵⁸ This is an argument that is very commonly run in the context of defamation (in which, despite some significant exceptions, the law is by and large happy to assimilate legal to natural persons).

However both counter-arguments are weak. The attribution of feelings to juridical persons would be a novel idea; adopting it solely in that context in order to recognise a right to privacy for non-natural persons would likely come across as desperate. If the idea of attributed feelings was to be pursued, this should be done in a principled and systematic way. As to the protection of economic interests, the obvious rebuttal is that, if the primary *aim* of the right (as opposed to an incidental effect) is to protect against financial losses, breach of privacy is the wrong cause of action to use; and pressing it into service for that purpose would be an abuse of the tort –⁵⁹ not to mention that, as was explained, many economic losses that we might want to describe as consequential upon breach of privacy are not in fact consequential at all.⁶⁰ This parallels the argument frequently made in the context of defamation that legal persons

⁵⁷ See, in England, *R v Broadcasting Standards Commission, ex p BBC* [2001] QB 885, [48], [49]: ‘I do not see how [privacy] can apply to an impersonal corporate body, which has no sensitivities to wound’; ‘an artificial “person”, having no sensibilities, cannot be made to suffer [emotional distress]’ (Lord Mustill – note however that His Lordship was thinking of a form of territorial privacy for which there is a stronger argument to be made that it requires a *corpus* on the plaintiff’s part); in Australia, *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63, 208 CLR 199, [128]: ‘of necessity, this artificial legal person lacks the sensibilities ... which provide a staple value for any developing law of privacy’; cf., in an American context, Robert Sack, *Sack on Defamation: Libel, Slander and Related Problems* (PLI 2010), 12.3.5: ‘Unlike actions for defamation, suits for invasion of privacy can be brought only by individuals. Neither corporations, associations nor partnerships have “feelings” ... and they therefore may not recover damages ... for such injury’.

⁵⁸ See e.g., in a New Jersey context, *NOC Inc v Schaefer* (1984) 484 A 2d 729, 731: ‘While a corporation may have its reputation or business damaged as a result of intrusive activity, it is not capable of emotional suffering’ (cited in *Lenah* (n 57), [127]). This is probably also what is meant by commentators who argue that privacy is, for non-natural persons, a means to an end rather than an end in itself: ‘A corporation does not want privacy for its own sake. Privacy to a corporation is only an intermediate good’: Anthony D’Amato, ‘Comment: Professor Posner’s Lecture on Privacy’ (1978) 12 *Georgia LR* 497, 500 (idem).

⁵⁹ I have argued more fully in a different context that the ‘patrimony defence’ of personality rights for non-corporeal persons, i.e. the idea that they ought to be endowed with a personality *because* they can suffer in their pocket, is profoundly misguided: Descheemaeker (n 49) 445-6.

⁶⁰ Above, 3.

should sue in injurious falsehood (or negligence) if they want to protect their economic interests, not by towing them to an artificial cause of action for injury to their reputation. Therefore the bipolar model makes it, if not absolutely impossible, at least very difficult and strained to accept that a juridical person might have a right to privacy.

On the other hand, on the unipolar model, it becomes a very natural conclusion. Again, one must be careful because the link is not one of necessity, but the correlation is very strong. Once one has escaped the fetters of consequentialist thinking, the only question becomes whether juridical persons are capable of holding a right to privacy and, if so, whether it is a good idea to grant it to them. On the first limb, it is very hard to deny that they can. The ability to hold rights is typically regarded as the keystone of personhood-at-law; and (contrary for instance to *corpus*, i.e. physical integrity) there is nothing definitionally impossible with a privacy right for non-natural persons. That they also have an interest in controlling the flow of information about themselves, in the sense that it is a good to which they might aspire, is equally self-evident. Of course one could insist that privacy is properly an attribute of corporeality (or humanity), and therefore that legal persons should not be possessed with such a right, but this argument starts looking remarkably like one is not taking seriously the notion of a juristic person.⁶¹ Following this line of thinking, legal persons would probably be denied all the rights that we typically describe as ‘personality rights’ (reputation, privacy, liberty, dignity, autonomy and the like) and be confined to property rights. This would fly directly in the face of what it means to be a person in the eyes of the law. Accordingly the unipolar model leads very naturally to the idea that legal persons do have a right to privacy (at least of the informational sort). At the very least it puts the onus on those who deny it to provide arguments why a person-at-law should not have a right of personality when there is no logical impossibility to it.

De lege lata, the issue has proved highly controversial and it is not difficult to attribute the unsettled character of the law to the underlying – yet unidentified – conflict between the two rationalities sketched out in the previous part, each pulling in the opposite direction to the other. South Africa has accepted that, in principle, all non-natural persons do have such a right.⁶² In the United States, on the other hand, the right has for the most part been denied.⁶³ While not determinative, judicial pronouncements have been very largely negative in Australia⁶⁴ and in England,⁶⁵ even

⁶¹ This is in fact visible in the use of inverted commas in Lord Mustill’s quote above (n 57). This article is not the place to argue fully, on a normative basis, for the privacy of non-natural persons: interested readers can be referred e.g. to Alan Westin, *Privacy and Freedom* (Bodley Head 1970) 42-51.

⁶² *Financial Mail (Pty) Ltd v Sage Holdings Ltd* [1993] ZASCA 3, 1993 (2) SA 451 (A), 460G-461H (Supreme Court of Appeal of South Africa, reasoning by analogy from the right to reputation which itself has been recognized as an attribute of legal persons in a South African context, albeit with very little theoretical discussion).

⁶³ On the basis of absence of feelings: see *Sack on Defamation* (n 57) 12.3.5, cited above; cf *United States Restatement Second, Torts*, §652I (‘an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded’). There is however a (small) strand of ‘dissenting’ opinions: see Lee Bygrave, ‘A right to privacy for corporations? *Lenah* in an international context’ (2001) 8 *Privacy Law & Policy Reporter*, 130, 133 n 39 and references cited.

⁶⁴ *Lenah* (n 57), esp [43] (Gleeson CJ grounding privacy in ‘human dignity’, which ‘may be incongruous when applied to a corporation’), [116], [126] (legal persons lack ‘sensibilities’), [132].

⁶⁵ The position is explained clearly in *Tugendhat and Christie* (n 9), §§8.72-8.76 (including the complication brought in by *ex p BBC* (above n 57), which concerned a claim for breach of a statutory duty not common-law privacy) and need not be repeated here. The main reason for Lord Mustill’s reluctance in that case to recognize the privacy of non-natural persons was, again, that privacy is an

though it is possible that English law might turn out to be constrained by the European Convention on Human Rights to protect at least that segment of the privacy right which concerns a juridical person's right to respect for its correspondence and freedom from intrusion onto its premises ('*domicile*' in the French text, which has a wider scope than 'home' in English).⁶⁶

2. The privacy of non-sentient natural persons

The very same reasoning applies to natural persons who are incapable of being distressed by the misuse of private information about them. The class may be defined more or less broadly depending on whether one insists that they should be distressed (or capable of distress) at the time when the wrong is committed or not, but at the very least it would include physical persons in a permanent coma or, as suggested in *Gulati*, claimants who died before discovering the covert invasion of privacy they had been subjected to.⁶⁷ It is likely also to include children who are too young to care, at least at the time when the action is brought on their behalf.⁶⁸ On the dominant bipolar model it is, for the same reasons as above, all but impossible to see how they could recover. On the other hand, on a unipolar model, these persons should be able to recover as a matter of principle, irrespective of any associated upset. If one believes that this is the right outcome, it becomes in turn a strong argument for the superiority of that model.

3. The meaning of loss in privacy actions

The third issue the choice of model has a direct bearing on is the meaning of loss in privacy actions. It should have already become apparent that many of the arguments or difficulties expounded above find their source in the fact that there exists different ways of construing compensable detriments in the context of privacy actions. The issue must now be examined in closer detail. However, for reasons already stated, this cannot be done without stepping back and examining the law of tort as a whole: whatever loss means, it should not be allowed to bear one meaning in a given context and something incompatible in a different context.

Despite the complexity of the details, it seems to me that the big picture of what tort law means by loss is in fact remarkably simple. Examining the substrata of English law (both past and present), we can discern three – and no more than three – understandings of the concept, which operate in concentric circles and can be related straightforwardly enough to the analytical models sketched out in the previous part.

'essentially human and personal concept' (at [49]). In an interesting echo of Roman *iniuria*, he linked that idea to that of 'the insult done to the person as a person' which the breach of privacy represents (ibid).

⁶⁶ *Tugendhat and Christie* (n 9), §§8.77-8.78. However, the authors are very quick to dismiss the significance of the ECtHR's case-law beyond these specific circumstances. Logically, if the Court recognizes that juridical persons enjoy *any* (sub-)type of privacy interest, English law would have no choice but to accept that these can have a right to privacy – even if a different and narrower one – if it is to remain Convention-compliant (unless this is held to come within the Member States margin of appreciation).

⁶⁷ *Gulati* (n 5), §136.

⁶⁸ As in the case of the Weller twins (above, 7) or young David Murray, the son of author Joanne Murray (better known as J. K. Rowling). It is however noticeable that the court in *Murray* reintroduced the idea of distress when it suggested that the reason why the parents of a young child who had not suffered distress at any point between the wrong and the judgment should be able to bring an action on his behalf was to protect his 'freedom ... to live normal lives without the constant fear of media intrusion' (*Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481, [50]): a form of pre-emptive protection against future distress.

The first, narrowest, circle would be loss in the Roman sense of *damnum*, that is to say, financial or pecuniary loss: loss that is directly valuable in money or, to put the same point differently, that leaves the claimant ‘out of pocket’. While no-one would probably want to argue today that, as a matter of principle, loss is restricted to *damnum* to the exclusion of anything else, this idea can in fact be seen to resurface time and again in modern discussions: the law has never quite got over the idea that loss that is not to the pocket is not real or proper loss.⁶⁹ The second circle, which is clearly the dominant paradigm, is to regard a loss as a concrete detriment suffered by the claimant: in Robert Stevens’ words, the situation of being ‘factually worse off’.⁷⁰ This is not easy to pin down with words – in particular, it is not the same as tangible injury – but it is not difficult to grasp intuitively. On that reading, both pecuniary losses and the sort of harms that were described in part I as non-pecuniary losses (which, it was argued, boil down to mental distress) count as loss. They make the claimant worse off in a *concrete* way. But this definition falls short of including losses sometimes described as ‘abstract’, ‘legal’ or ‘normative’, that is to say, harms which do not leave the defendant worse off either financially or emotionally and only are losses because the law says so.⁷¹ Loss of use, loss of autonomy, loss of liberty and the like, considered in and by themselves (i.e. independently of any noxious consequences which may or may not actualise), are examples of ‘non-concrete’ losses which are excluded on the intermediary – and dominant – understanding of loss. The third concentric circle, on the other hand, includes these abstract losses as well as the concrete ones. On that model, every violation (or diminution) of a right – i.e. every wrongful interference with a protected interest – counts as a loss, irrespective of its financial or emotional consequences on the claimant. To follow Tony Weir’s above taxonomy,⁷² losses consist in the diminution of – encroachments on the rights to – ‘liberty, physical integrity, land, possessions, reputation, wealth, privacy, dignity’ and any other ‘goods’ that the law might recognise and protect against at least a range of interferences.

From the above characterisation, it can easily be seen that the two analytical frameworks outlined earlier to understand the relationship between wrong and loss are tied to two different understandings of ‘loss’ which correspond to two different constructions of what compensable detriments in privacy actions are. The bipolar model, which counts as losses *damnum* and loss of happiness, is predicated on the intermediary definition of loss as being factually worse-off: the two are the flipside one of the other and it is therefore entirely unsurprising that they should have risen to prominence together. On that reading, the losses privacy concerns itself with are, *like any other cause of action*, financial loss and mental distress. The unipolar model, on the other hand, is wedded to the widest definition of loss as being a ‘right-diminution’: as was explained, it conflates the loss with the wrong, that is to say, with the encroachment upon the right – in our context, the right to privacy. On that conceptualisation, the loss or harm suffered by the claimant in a privacy action is loss

⁶⁹ One example of this line of thinking among many others: ‘Mental distress is a harm, but to say that it is a “loss” courts the danger of its being understood as a compensable pecuniary detriment; and the fact that it is not then begins to suggest that it is not the proper subject of any award at all’: Birks (n 48) 30.

⁷⁰ Stevens (n 23) 59: ‘although loss is not limited to financial loss, in principle it requires proof that the claimant was factually worse off as a result of the infringement of the right’; also p. 78: “‘Loss” has been used in the sense of being factually worse off”.

⁷¹ This is different from saying that they only are *actionable* losses because the law says so, which is of course invariably true.

⁷² Above, n 42.

of privacy and, consequential losses apart, *nothing but it* – ordinary distress and direct pecuniary loss being subsumed under it.

The two models being grounded in two conflicting logics, the choice made on one level pre-empts the choice made on the other: what one cannot have is a unipolar model with the intermediate meaning of loss (which would be a contradiction in terms) or the bipolar model with the widest understanding of loss (which would amount to treating the same loss – here loss of privacy – both as the wrong itself and a consequence of the wrong: a contradiction in terms).

4. Compensating and vindicating the right to privacy

The final point to be examined concerns the relationship between compensatory and so-called ‘vindicatory’ money awards in the law of privacy. The argument flows logically from the previous section and, again, the law of privacy must be examined here in the broader context of tort law.

As can easily be seen, on the narrower of the two main understandings of loss sketched out above (i.e. the middle one, of loss as factual worse-offness), there will by construction be detriments or harms that cannot be called losses. They are those losses included in the widest definition, but excluded by the intermediary one, which we described as abstract, legal or normative losses: for example, in our instant case, the loss of privacy considered *per se*. If they are not losses, by definition they cannot be compensated.⁷³ From this a simple alternative follows, with three branches. The law can either (i) deny redress altogether on the basis that there is no ground for the law to intervene, as the Roman *lex Aquilia* did with the castrated slave-boy;⁷⁴ (ii) grant nominal damages to mark the right-infringement *sans* loss; or (iii) grant substantial damages anyway. The second branch has historically been the response of the common law in situations of wrong without loss (in the factual worse-offness sense of the term). What is of interest to us in the present context is the third one. As is well known, English law has increasingly come to recognise a class of substantial damages in situations where a wrong has been suffered but, on the usual understanding of the term, no loss suffered. The term ‘vindicatory damages’ has now established itself to designate this sort of award. Why the law would want to recognise such an (at least apparently) novel category and how it relates to existing categories are difficult questions which have already caused a lot of ink to spill. In particular, it has been remarked that all money damages in tort have a vindicatory function, in the sense of affirming judicially the existence of the claimant’s right and the need to respect it,⁷⁵ which makes it peculiar to use the term to designate a narrow, and largely residual, type of monetary awards. But this discussion belongs elsewhere.

The one point worth mentioning here is that, while the concept of vindicatory damages (in the sense of substantial damages which are meant neither to compensate the plaintiff for a loss nor make the defendant disgorge a gain or punish him for some wrongdoing) is required under the intermediary meaning of loss – itself tied to the bipolar model – so as to step into the breach opened by the exclusion of non-‘lossful’

⁷³ I treat it as an apodictic proposition that compensation is for losses and losses only. This does not appear to be doubted by anyone.

⁷⁴ Above, 10.

⁷⁵ E.g. Normann Witzleb and Robyn Carroll, ‘The role of vindication in tort damages’ (2009) 17 *Tort L Rev* 16, 16: ‘The award of every judicial remedy, whether in the nature of declaration, coercion, compensation, restitution or punishment, can be said, in general terms, to vindicate the legal rights of the plaintiff’.

detriments from the ambit of compensatory awards, it becomes redundant under the widest meaning of loss and the unipolar model that is wedded to it. For, if loss of privacy – or liberty or any other interest in the context of which the label might be used – is a proper loss, it follows that it can – indeed it should – be compensated with proper – i.e. substantial – money damages.⁷⁶ On the other hand, if courts refuse to characterise it as loss but still want to award more than nominal damages, then they need to come up with an alternative label and an alternative logic.⁷⁷

Within privacy, the concept of vindication-apart-from-compensation was touched upon, if with a level of ambiguity, by the High Court in *Mosley*, when Eady J opined that, when it came to assessing quantum of damages, '[a]part from distress' there was 'another factor which probably has to be taken into account ... that of vindication to mark the infringement of a right ... to mark the fact that ... a[n] individual has taken away or undermined the right of another – in this case taken away a person's dignity'.⁷⁸ However, in the wake of *Weller*⁷⁹ and *Gulati*⁸⁰ (which themselves followed on the important judgment of the Supreme Court in *Lumba*),⁸¹ it would appear that vindictory damages are, as a matter of principle, no longer available in breach of privacy actions. This has very significant implications for our debate. Since the view that breaches of privacy which do not cause either distress or pecuniary loss are no longer actionable, or only sound in nominal damages, would be blatantly inconsistent with these two decisions, it would seem that the only option left to us is to accept that substantial *compensatory* damages are available for loss of privacy per se. Having removed the safety valve of vindictory damages, which allowed it to maintain ambiguity concerning what harms it actually compensates, the law would have no choice but to switch to the widest meaning of loss and therefore to the unipolar model. This seems to have been recognised by Mann J in *Gulati*, when he held that '[d]amages awarded to reflect the infringement are not vindictory in the sense of *Lumba*. They are truly compensatory'.⁸²

It is difficult not to recognise the superior logic of this alternative model, which can be broken down in four limbs: (i) loss of privacy is, in itself, a real loss; (ii) it is a real loss because privacy is a real 'good'; indeed this is the reason why the law grants it protection in the first place; (iii) if it is a real loss then it can be redressed with real, i.e. *substantial* (not nominal) *compensatory* (not vindictory) damages; (iv) the compensation of the loss indirectly operates, as per the usual principles, as vindication of the right infringed.⁸³ Yet, this pristine logic stands at odds with the rest

⁷⁶ Of course the amount awarded is arbitrary but that is true of all losses which do not leave the claimant out of pocket.

⁷⁷ It is tempting to go one step further and argue that the current explanation is precarious – being massively over-inclusive – precisely because it originates in an unworkable attempt to redress violations of right per se while retaining a narrower, and incompatible, understanding of loss grounded in the old bipolar model.

⁷⁸ *Mosley* (n 1), [216]. He however added, puzzlingly, that '[i]f other factors mean that significant damages are to be awarded, in any event, the element of vindication does not need to be reflected in an even higher award'. This seems to be a way of straddling the two models by saying that substantial-damages-as-vindication are a fall-back option to be resorted to when substantial-damages-as-compensation collapse because of the narrower meaning of loss used by courts. If this was true, however, it would destroy the meaningfulness of the concept of loss.

⁷⁹ *Weller* (n 16), [190].

⁸⁰ *Gulati* (n 5), [128].

⁸¹ *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.

⁸² *Gulati* (n 5), [132].

⁸³ '[T]he vindication is effected through compensation': Witzleb and Carroll (n 75) 22.

of tort law, which as was seen follows, by and large, a different model. Accepting it in the particular context of breach of privacy would therefore have a massive rippling effect on the rest of the law, it being well nigh impossible (as well as undesirable) for privacy actions to follow a separate logic of their own.

Conclusion

This article has sought to identify and order the harms or losses which the law might redress in actions for breach of privacy. This entailed straddling an uneasy divide between, on the one hand, a close examination of privacy cases and, on the other, much broader issues of private law theory. The existence of two theoretical models of tort law, coming with two different ways of understanding the relationship between wrong and harm, or loss, was identified and applied to the context of privacy actions, which constitutes perhaps the clearest battlefield between the two models. It was argued that on one model, the wrong is in itself transparent and what the law seeks to compensate are the detriments that flow from it, which are themselves either to the pocket (pecuniary loss) or to the feelings (mental distress). On the other model, the harm conflates with the wrong and it is the diminution of the right itself which is compensated, even though the noxious consequences will factor into the valuation of the injury – and, for that reason, direct losses should not be compensated as well lest double recovery should occur. Because these models are alternative, and incompatible, ways of understanding the whole of tort law, courts should neither combine them nor switch back and forth between them. In the context of privacy, the implication is that the three heads of detriment recognised by the law and which were identified in the first part – namely, pecuniary loss, mental distress broadly construed and loss of privacy – ought not to be combined. The law should aim to compensate *either* the first two *or* the last, these being two ways of approximating, from two opposite perspectives, the very same injury or injuries suffered by the claimant.

On a theoretical level, the choice we make between these two models – described as respectively ‘bipolar’ and ‘unipolar’ – has momentous consequences, in particular in terms of our understanding of the notion of loss and the role of vindictory damages, first in the law of privacy and then, by a rippling effect, across the law of tort. The recent cases of *Weller* (2014) and *Gulati* (2015) – both of which are currently under appeal – are especially significant in this respect in that they appear to mark a clear switch away from the traditional consequentialist model of tort law and focus on the right-injury instead, thereby pressing into service the loss-as-wrong model of tort. The practical implications are also highly significant, in particular when it comes to the availability of actions for breach of privacy to juridical persons and natural persons who have not been affected emotionally by the wrong. In the background to this apparently technical debate stand fundamental, and highly value-laden, questions about the nature of personhood and what it means for a person to be the holder of rights.